MONTANA ADMINISTRATIVE REGISTER

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PAGES 1-56

ISSUE NO. 1

The Montana Administrative Register (MAR or Register), a twice-monthly publication, has three sections. The Proposal Notice Section contains state agencies' proposed new, amended, or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted. The Rule Adoption Section contains final rule notices which show any changes made since the proposal stage. All rule actions are effective the day after publication of the adoption notice unless otherwise specified in the final notice. The Interpretation Section contains the Attorney General's opinions and state declaratory rulings. Special notices and tables are found at the end of each Register.

Inquiries regarding the rulemaking process, including material found in the Montana Administrative Register and the Administrative Rules of Montana, may be made by calling the Secretary of State's Office, Administrative Rules Services, at (406) 438-6122.

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BEFORE THE PUBLIC EMPLOYEES' RETIREMENT BOARD
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 2.43.1306 pertaining to actuarial rates and assumptions	)))))	NOTICE OF PROPOSED AMENDMENT NO PUBLIC HEARING CONTEMPLATED

TO: All Concerned Persons

1. On February 25, 2023, the Public Employees' Retirement Board (board) proposes to amend the above-stated rule.

2. The board will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Montana Public Employee Retirement Administration (MPERA) no later than 5:00 p.m. on February 3, 2023, to advise us of the nature of the accommodation that you need. Please contact Kris Vladic, MPERA, P.O. Box 200131, Helena, Montana, 59620-0131; telephone (406) 444-2578; fax (406) 444-5428; TDD (406) 444-1421; or e-mail kvladic@mt.gov.

3. The rule as proposed to be amended provides as follows, new matter underlined, deleted matter interlined:

2.43.1306 ACTUARIAL RATES AND ASSUMPTIONS (1) The actuary will present the actuarial data and recommend the board adopt specific rates and assumptions. The board in its discretion will adopt rates and assumptions and publish them in a board policy. The board adopts and incorporates by reference BOARD Admin 09 Actuarial Valuation Assumptions and Methods (approved June ~~8~~ 9, ~~2017~~ 2022), providing actuarial rates, assumptions, methods, and factors used for valuation and actuarial equivalence purposes. BOARD Admin 09 also contains the early retirement factor tables applicable to PERS, HPORS, and SRS.

(2) and (3) remain the same.

AUTH: 19-2-403, MCA
IMP: 19-2-405, 19-17-107, MCA

STATEMENT OF REASONABLE NECESSITY: The Internal Revenue Service requires public pension systems to adopt actuarial assumptions, rates, methods, and factors in a manner that gives them the force and effect of law. The IRS requirement is an issue that may affect the qualified status of public pension retirement systems. Adopting the applicable actuarial assumptions, rates, methods, and factors into rule by reference gives them the force and effect of law.

The board's actuary performs an experience study every five to seven years. Information obtained through the experience study is used by the actuary to update demographic and economic assumptions relied on when conducting annual valuations of the defined benefit retirement systems administered by the board and to determine actuarial equivalent option factors as well as actuarial cost factors for all defined benefit retirement systems (BOARD Admin 09).

The recommended assumptions resulting from an experience study for the 5-year period from July 1, 2016, to June 30, 2021, were presented to the board on May 12, 2022, and adopted in the same meeting. BOARD Admin 09 was updated with those recommended assumptions accordingly and approved by the board on June 9, 2022. This administrative rule update is necessary to give the applicable actuarial assumptions, rates, methods, and factors from that board policy the force and effect of law.

4. Concerned persons may submit their data, views, or arguments concerning the proposed action in writing to: MPERA, P.O. Box 200131, Helena, Montana, 59620-0131; telephone (406) 444-3154; fax (406) 444-5428; or e-mail mpera@mt.gov, and must be received no later than 5:00 p.m., February 10, 2023.

5. If persons who are directly affected by the proposed amendments wish to express their data, views, or arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request along with any written comments they have to Kris Vladic at the above address no later than 5:00 p.m., February 3, 2023.

6. If the board receives requests for a public hearing on the proposed amendments from either 10 percent or 25, whichever is less, of the persons directly affected by the proposed amendment; from the appropriate administrative rule review committee of the Legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those directly affected has been determined to be 9,380 persons based on the following combined total of members, retirees, and beneficiaries in each defined benefit system administered by MPERA as of June 30, 2021: Public Employees' Retirement System – 79,581, Judges' Retirement System – 134, Highway Patrol Officers' Retirement System – 648, Sheriffs' Retirement System – 3,283, Game Wardens' and Peace Officers' Retirement System – 2,115, Municipal Police Officers' Retirement System – 2,039, Firefighters' Unified Retirement System – 1,550, Volunteer Firefighters' Compensation Act – 4,453, for a total of 93,803 persons.

7. The board maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless

a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 4 above or may be made by completing a request form at any rules hearing held by the board.

8. An electronic copy of this proposal notice is available through the Secretary of State's web site at http://sosmt.gov/ARM/Register.

9. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

10. With regard to the requirements of 2-4-111, MCA, the board has determined that the amendment of the above-referenced rule will not significantly and directly impact small businesses.

/s/ Nicholas Domitrovich	/s/ Maggie Peterson
Nicholas Domitrovich	Maggie Peterson
Chief Legal Counsel	President
and Rule Reviewer	Public Employees' Retirement Board

Certified to the Secretary of State January 3, 2023.

BEFORE THE DEPARTMENT OF FISH, WILDLIFE AND PARKS
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 12.2.605, 12.2.606, 12.2.607, and 12.2.608 pertaining to public access land agreements	))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Concerned Persons

1. On December 9, 2022, the Department of Fish, Wildlife and Parks published a notice of public hearing on the proposed amendment of the above-stated rules on page 2230 of the 2022 Montana Administrative Register, Issue No. 23. The department is refiling this proposed amendment due to a failure to send the notice to interested parties by the statutory deadline.

2. On February 10, 2023, at 2:00 p.m., the Department of Fish, Wildlife and Parks (department) will hold a telephonic public hearing via the ZOOM meeting platform to consider the proposed amendment of the above-stated rules. There will be no in-person hearing. Interested parties may access the remote conferencing in the following way:

(a) Dial by telephone: 1-206-337-9723
Meeting ID: 857 9631 8398
Passcode: 777071

3. The department will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the department, no later than 5:00 p.m., on January 27, 2023, to advise us of the nature of the accommodation that you need. Please contact Crissy Bell, Department of Fish, Wildlife and Parks, P.O. Box 200701, Helena, Montana, 59620-0701; telephone (406) 444-4594; or e-mail cbell@mt.gov.

4. The rules proposed to be amended provide as follows, new matter underlined, deleted matter interlined:

<u>12.2.605 DEFINITIONS</u> (1) "Inaccessible public land" means public land wholly surrounded by private land by which there is no other legal access via public road, trail, right of way or easement; public waters; adjacent federal, state, county, or municipal land that is open to public use; or adjacent private land for which that landowner has not granted permission to cross.

(2) "Landowner" means an individual, association, organization, or business entity, that owns land in fee, or a tenant or contract for deed purchaser with written authority to enter a PALA and receive payments.

(3) "PALA" means public access land agreement. A PALA is an agreement between a private landowner and the department pursuant to 87-1-295, MCA,

whereby the public is allowed access across private lands to inaccessible public lands or under accessible public lands.

(4) "PL/PW" means private land/public wildlife advisory committee provided for in 87-1-269, MCA.

(5) "Public land" means FWP lands, and state and school trust lands as defined in 77-1-101, MCA, or federal land managed by the U.S. Department of the Interior or the U.S. Department of Agriculture.

(6) "Public land that is leased by the landowner" means "Inaccessible public land" or "under accessible public land" for which a landowner has an agreement with a government agency authorizing the landowner to use the whole or part of the ~~inaccessible~~ public land for grazing or farming.

(7) "Under accessible public land" means public land for which there is no other legal access point within ~~two miles~~ one mile via public road, trail, right of way or easement; public waters; adjacent federal, state, county, or municipal land that is open to public use. A distance of less than one mile may be eligible if the department determines that it improves public access to lands based on site specific considerations. Access via public waters may also be considered under accessible if there are safety concerns which limit access by boat (due to rapids, boulders, log jams) and/or by foot while remaining within the high water mark (due to swift currents, deep water along banks, slippery substrate).

AUTH: ~~87-1-297~~ 87-1-295, MCA
IMP: 87-1-295, ~~87-1-296,~~ MCA

12.2.606 APPLICATION FOR PUBLIC ACCESS LAND AGREEMENT

(1) The PALA application must include the following information:

(a) legal land description of public land to which access is being proposed;

(b) description of the proposed road, travel route, or connecting private lands legal land description through which access is being proposed;

(c) map depicting public land to be accessed, and public access route across private land;

(d) transportation mode by which public access is to be allowed;

(e) evidence, such as a copy of the lease or permit, as to whether the public land to be accessed is public land that is leased by the landowner; and

(f) request for reimbursement of improvements, if applicable, on private land ~~to the land provided by the department~~ to facilitate public access to the public land. Improvements are limited to and valued at $1,000 per agreement year dependent upon available program funds.

(2) If the property through which access is provided is owned in common by multiple owners, the PALA application must specify the share of the payment to which each owner is entitled, and each owner or agent of the owner must sign the application.

(3) The department shall develop and maintain a PALA application form.

(4) Failure to include any required information may result in denial of the application.

AUTH: ~~87-1-297~~ 87-1-295, MCA

IMP: 87-1-295, ~~87-1-296,~~ MCA

12.2.607 PUBLIC ACCESS LAND AGREEMENTS (1) Before approving a PALA the department must exercise due diligence to verify that:

(a) the public lands are not restricted or closed to general recreational use by the land management agency that owns or has legal control of the public land;

(b) the private lands, or any right of way, road, or trail to be utilized are wholly owned by the applicant(s) and there is open access across the designated access route;

(c) the public has no existing right of access over the proposed route;

(d) access routes restricted to foot travel only:

(i) must be capable of accommodating normal ambulatory travel; and

(ii) must not exceed one linear mile from the beginning to the end of the access route; and

(e) access routes available to motorized vehicles must be safe and passable during dry conditions for two-wheel drive vehicles.

(2) If access to inaccessible public land or under accessible public land can only or most effectively be provided through separate properties owned by different landowners, an agreement may be issued with each landowner provided each landowner holds the lease or permit on the public land or the public land does not have an existing lease or permit.

(3) Contingent on the annual availability of funds to operate the PALA program, landowners may elect to participate in a PALA for up to 10 years with the agreement being renewed annually.

(4) Applications must be received by a date set by the department ~~at least 6 weeks prior to the next upcoming PL/PW meeting~~ to allow for time for adequate department ~~and PL/PW~~ review.

(5) A PALA shall not be construed to support, establish or preclude, limit or diminish any claim for the right to public use.

(6) The department may not enter a PALA where there is an existing right of public access over the proposed access route. If the department is uncertain whether the proposed access route is public or private, or if a controversy exists over whether the proposed access route is public or private, the department shall present its findings to the PL/PW for its consideration in its recommendation.

(7) Consideration for PALA enrollment will be given to those sites that are open during commission-established hunting or fishing seasons, or both.

(8) A PALA may be terminated by the department or the landowner if the terms of the agreement are violated. An agreement may be canceled, and a landowner's property withdrawn from the program at any time due to circumstances beyond the control of the landowner or the department, such as death, illness, natural disaster, or acts of nature. In the event of termination, payment will be reduced and correlated to the time frame and access provided.

(9) The landowner and the department may deny access to an individual(s) for violation of PALA rules.

(10) A PALA does not convey to the public any right to hunt or otherwise recreate on the private land through which they can travel to reach public land.

(11) The department shall maintain and make available to the public a list of current PALA locations and rules.

(12) With department approval, a landowner may impose reasonable limitations through temporary closure of a PALA to address concerns related to high fire danger, weather-related impact to travel route, safety, or agricultural production activities such as livestock handling or harvest and planting of crops, so long as:

(a) the landowner notifies department regional headquarters at least 24 hours prior to the closure;

(b) the landowner posts notice to the public on-site; ~~and~~

(c) the closure is removed within 24 hours after the conditions causing the closure no longer to exist.~~;~~ ; and

(d) its closure is in effect for no more than seven days without additional department review and approval.

AUTH: ~~87-1-297~~ 87-1-295, MCA
IMP: 87-1-295, ~~87-1-296,~~ MCA

12.2.608 LANDOWNER COMPENSATION (1) In negotiating for the annual payment to a landowner, the department shall consider:

(a) acres of public land accessed;

(b) the quality of fish or wildlife habitat that may be provided by the public land to be accessed;

(c) duration public access is allowed;

(d) mode of transportation allowed;

(e) whether closures can be expected; and

(f) other uses allowed.

(2) Landowners in the program may receive:

(a) monetary compensation not to exceed $15,000 per annual agreement; and

(b) improvements provided by the department to the private land that facilitate public access.

AUTH: ~~87-1-297~~ 87-1-295, MCA
IMP: 87-1-295, ~~87-1-296,~~ MCA

REASON: The department is proposing to amend the rules pertaining to public access land agreements to streamline administration of the program and better reflect existing practices as well as to increase the potential for additional applications that qualify by reducing the access point to public lands from two miles to one mile.

The rules are also being amended to update the references to statutes that were repealed in the 2021 legislative session.

5. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: PALA Rules, Department of Fish, Wildlife and Parks, P.O. Box 200701,

Helena, Montana, 59601-0701; or e-mail lndsportrelations@mt.gov with the subject line "PALA Rules," and must be received no later than February 13, 2023.

6. Crissy Bell, or another hearing officer appointed by the department, has been designated to preside over and conduct the hearing.

7. The department maintains a list of interested persons who wish to receive notice of rulemaking actions proposed by the department or commission. Persons who wish to have their name added to the list shall make a written request that includes the name and mailing address of the person to receive the notice and specifies the subject or subjects about which the person wishes to receive notice. Such written request may be mailed or delivered to: Department of Fish, Wildlife and Parks, Legal Unit, P.O. Box 200701, 1420 East Sixth Avenue, Helena, MT 59620-0701, or may be emailed to cbell@mt.gov

8. An electronic copy of this proposal notice is available through the Secretary of State's web site at http://sosmt.gov/ARM/Register.

9. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

10. With regard to the requirements of 2-4-111, MCA, the department has determined that the amendment of the above-referenced rules will not significantly and directly impact small businesses.

/s/ Zach Zipfel
Zach Zipfel
Rule Reviewer

/s/ Dustin Temple
Dustin Temple
Deputy Director
Department of Fish, Wildlife and Parks

Certified to the Secretary of State January 3, 2023.

BEFORE THE SECRETARY OF STATE
OF THE STATE OF MONTANA

In the matter of the adoption of New Rule I pertaining to the Business Services annual report filing fee waiver in 2024	))))	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION

TO: All Concerned Persons

1. On February 3, 2023, at 11:00 a.m., the Secretary of State will hold a public hearing in the Secretary of State's Office conference room, Room 260, State Capitol, Helena, Montana, to consider the proposed adoption of the above-stated rule.

2. The Secretary of State will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Secretary of State no later than 5:00 p.m., January 27, 2023, to advise us of the nature of the accommodation that you need. Please contact Sue Ames, Secretary of State's Office, P.O. Box 202801, Helena, MT 59620-2801; telephone (406) 444-2807; fax (406) 444-3976; TDD/Montana Relay Service (406) 444-9068; or email sames@mt.gov.

3. The rule proposed to be adopted provides as follows:

NEW RULE I 2024 ANNUAL REPORT FEE WAIVER (1) For all annual reports filed between January 1, 2024 and April 15, 2024, the Secretary of State's Office will waive the fee required by ARM 44.5.114(3)(e) and 44.5.115(3)(d).

AUTH: 2-15-405, MCA
IMP: 2-15-405, MCA

REASONABLE NECESSITY: Montana has experienced record growth in new business filings over the last three years (21% in 2020, 28% in 2021, and 3% in 2022). In addition, the online business filing system implemented in December 2020 provides efficiencies that reduce review and processing time by the Secretary of State's Office staff. Montana law (2-15-405, MCA) allows the Secretary of State to establish fees commensurate with the overall costs of the office. After a review of the office's operational revenue and expenses, it was determined that it is appropriate to propose a one-time fee waiver for all businesses filing an annual report (on time) in 2024.

4. With regard to the requirements of 2-4-302(1)(c), MCA, it has been determined that these changes will have a fiscal impact. It is estimated that there are currently approximately 224,000 active businesses. If those businesses file their 2024 annual report by the deadline, the elimination of the annual report filing fee will

result in an estimated $4,480,000 savings for those businesses. The estimated impact for each fee is below:

- 44.5.114(3)(e) – Corporations
  - Approximately 62,000 businesses will save $1,240,000 through this fee waiver.
- 44.5.115(3)(d) – Limited Liability Companies
  - Approximately 162,000 businesses will save $3,240,000 through this fee waiver.

5. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Angela Nunn, Secretary of State's Office, P.O. Box 202801, Helena, Montana 59620-2801, or by e-mailing angela.nunn@mt.gov, and must be received no later than 5:00 p.m., February 10, 2023.

6. Austin James, Secretary of State's Office, has been designated to preside over and conduct the hearing.

7. The Secretary of State maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list may submit their request online at https://sosmt.gov/arm/secretary-of-state-administrative-rules/ or submit a written request which includes the name and contact information of the person who wishes to receive notices. Written requests may be mailed or delivered to the Secretary of State's Office, Administrative Rules Services, 1301 E. 6th Avenue, P.O. Box 202801, Helena, MT 59620-2801, or emailed to sosarm@mt.gov.

8. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

9. With regard to the requirements of 2-4-111, MCA, the Secretary of State has determined that the adoption of the above-referenced rule will directly impact small businesses. Based on the Montana Department of Labor and Industry's Quarterly Census of Employment and Wages, 99.9% of all Montana businesses are small businesses. Therefore, it is estimated that approximately 223,776 businesses registered with the Secretary of State's Office will be positively impacted by the proposed annual report fee waiver in 2024.

/s/ AUSTIN JAMES
Austin James
Rule Reviewer

/s/ CHRISTI JACOBSEN
Christi Jacobsen
Secretary of State

Dated this 3rd day of January, 2023.

BEFORE THE DEPARTMENT OF AGRICULTURE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 4.9.401 pertaining to wheat and barley assessment and refunds	)))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On September 23, 2022, the Department of Agriculture published MAR Notice No. 4-22-276 pertaining to the public hearing on the proposed amendment of the above-stated rule at page 1786 of the 2022 Montana Administrative Register, Issue Number 18.

2. The department has amended ARM 4.9.401 as proposed.

3. The department intends to apply the rule amendment retroactively to January 1, 2023. A retroactive application of the rule amendment does not result in a negative impact to any affected party.

4. The department has thoroughly considered the comments and testimony received. A summary of the comments received, and the department's responses are as follows:

There were six comments all in support of the increase or even a greater increase. Based on those comments, the department is comfortable adopting the fee increase as originally proposed.

/s/ Cort Jensen
Cort Jensen
Rule Reviewer

/s/ Christy Clark
Christy Clark
Director
Department of Agriculture

Certified to the Secretary of State January 3, 2023.

BEFORE THE BOARD OF INVESTMENTS
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 8.97.313 and 8.97.1707 pertaining to Board of Investments rules	))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On July 22, 2022, the Board of Investments published MAR Notice No. 8-97-101 regarding the public hearing on the proposed amendment of the above-stated rules at page 1212 of the 2022 Montana Administrative Register, Issue Number 14.

2. No comments or testimony was received.

3. The board has amended ARM 8.97.313 and 8.97.1707 as proposed.

BOARD OF INVESTMENTS
Karl Englund, Chair

/s/ Dan Whyte
Dan Whyte
Rule Reviewer

/s/ Dan Villa
Dan Villa, Executive Director
Board of Investments

Certified to the Secretary of State January 3, 2023.

BEFORE THE DEPARTMENT OF FISH, WILDLIFE AND PARKS
OF THE STATE OF MONTANA

In the matter of the adoption of an emergency rule closing the Ennis Fishing Access Site on the Madison River in Madison County	))))	NOTICE OF ADOPTION OF EMERGENCY RULE

TO: All Concerned Persons

1. The Department of Fish, Wildlife and Parks (department) has determined the following reasons justify the adoption of an emergency rule closing the Ennis Fishing Access Site:

(a) There are ice jams on the Madison River that have caused water and ice to channel through multiple portions of the fishing access site.

(b) The combination of dangerous conditions includes ice covered roadways and accessways, and the potential for flooding, ultimately rendering unsafe conditions for pedestrian and vehicle travel.

(c) Persons recreating at the fishing access site would be at risk of unsafe roadways, injury, or drowning.

(d) Therefore, as this situation constitutes an imminent peril to public health, safety, and welfare, and this threat cannot be averted or remedied by any other administrative act, the department adopts the following emergency rule. The emergency rule will be sent as a press release to newspapers throughout the state. Also, signs informing the public of the closure will be posted at access points. The rule will be sent to interested parties and published as an emergency rule in Issue No. 1 of the 2023 Montana Administrative Register.

2. The department will make reasonable accommodations for persons with disabilities who wish to participate in the rulemaking process and need an alternative accessible format of the notice. If you require an accommodation, contact the department no later than 5:00 p.m. on January 27, 2023, to advise us of the nature of the accommodation that you need. Please contact Crissy Bell, Fish, Wildlife and Parks, 1420 East Sixth Avenue, P.O. Box 200701, Helena, MT 59620-0701; telephone (406) 444-4594; or e-mail cbell@mt.gov.

3. The emergency rule is effective December 19, 2022, when this rule notice is filed with the Secretary of State.

4. The text of the emergency rule provides as follows:

<u>RULE I ENNIS FISHING ACCESS SITE EMERGENCY CLOSURE</u>

(1) Ennis Fishing Access Site is located along the Madison River in Madison County.

(2) Ennis Fishing Access Site is closed to all public occupation and recreation as signed.

(3) This rule will remain in effect until the department determines that the site is again safe for public occupancy. This will depend on the extent and the duration of the ice jams on the river causing flooding into the fishing access site. Signs closing the fishing access site will be removed when the rule is no longer effective.

AUTH: 2-4-303, 87-1-202, MCA
IMP: 2-4-303, 87-1-202, MCA

5. The rationale for the emergency rule is set forth in paragraph 1.

6. Concerned persons are encouraged to submit their comments to the department. Please submit comments along with names and addresses to: Crissy Bell, Department of Fish, Wildlife and Parks, P.O. Box 200701, Helena, MT, 59602-0701; e-mail cbell@mt.gov. Any comments must be received no later than February 11, 2023.

7. The department maintains a list of interested persons who wish to receive notice of rulemaking actions proposed by the department or commission. Persons who wish to have their name added to the list shall make written request that includes the name and mailing address of the person to receive the notice and specifies the subject or subjects about which the person wishes to receive notice. Such written request may be mailed or delivered to Fish, Wildlife and Parks, Legal Unit, P.O. Box 200701, 1420 East Sixth Avenue, Helena, MT 59620-0701, faxed to the office at (406) 444-7456, or may be made by completing the request form at any rules hearing held by the department.

8. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

9. The special notice requirements of 2-4-303, MCA have been met. All committee members and staff of the Environmental Quality Council, with addresses provided on the Montana Legislature's website (leg.mt.gov), were contacted by e-mail on December 19, 2022.

/s/ Quentin Kujala
Quentin Kujala
Chief of Staff
Department of Fish, Wildlife and Parks

/s/ Zachary Zipfel
Zachary Zipfel
Rule Reviewer

Certified to the Secretary of State December 19, 2022.

BEFORE THE DEPARTMENT OF FISH, WILDLIFE AND PARKS
OF THE STATE OF MONTANA

In the matter of the adoption of an emergency rule closing the York's Islands Fishing Access Site on the Missouri River in Broadwater County	))))	NOTICE OF ADOPTION OF EMERGENCY RULE

TO: All Concerned Persons

1. The Department of Fish, Wildlife and Parks (department) has determined the following reasons justify the adoption of an emergency rule closing the York's Islands Fishing Access Site:

(a) There are ice jams on the Missouri River that have caused water and ice to channel through multiple portions of the fishing access site.

(b) The combination of dangerous conditions includes ice-covered roadways and accessways and flooding, ultimately rendering unsafe conditions for pedestrian and vehicle travel.

(c) Persons recreating at the fishing access site would be at risk of unsafe roadways, injury, or drowning.

(d) Therefore, as this situation constitutes an imminent peril to public health, safety, and welfare, and this threat cannot be averted or remedied by any other administrative act, the department adopts the following emergency rule. The emergency rule will be sent as a press release to newspapers throughout the state. Also, signs informing the public of the closure will be posted at access points. The rule will be sent to interested parties and published as an emergency rule in Issue No. 1 of the 2023 Montana Administrative Register.

2. The department will make reasonable accommodations for persons with disabilities who wish to participate in the rulemaking process and need an alternative accessible format of the notice. If you require an accommodation, contact the department no later than 5:00 p.m. on January 27, 2023, to advise us of the nature of the accommodation that you need. Please contact Crissy Bell, Fish, Wildlife and Parks, 1420 East Sixth Avenue, P.O. Box 200701, Helena, MT 59620-0701; telephone (406) 444-4594; or e-mail cbell@mt.gov.

3. The emergency rule is effective December 29, 2022, when this rule notice is filed with the Secretary of State.

4. The text of the emergency rule provides as follows:

RULE I YORK'S ISLANDS FISHING ACCESS SITE EMERGENCY CLOSURE (1) York's Islands Fishing Access Site is located along the Missouri River in Broadwater County.

(2) York's Islands Fishing Access Site is closed to all public occupation and recreation as signed.

(3) This rule will remain in effect until the department determines that the site is again safe for public occupancy. This will depend on the extent and the duration of the ice jams on the river causing flooding into the fishing access site. Signs closing the fishing access site will be removed when the rule is no longer effective.

AUTH: 2-4-303, 87-1-202, MCA
IMP: 2-4-303, 87-1-202, MCA

5. The rationale for the emergency rule is set forth in paragraph 1.

6. Concerned persons are encouraged to submit their comments to the department. Please submit comments along with names and addresses to: Crissy Bell, Department of Fish, Wildlife and Parks, P.O. Box 200701, Helena, MT, 59602-0701; e-mail cbell@mt.gov. Any comments must be received no later than February 11, 2023.

7. The department maintains a list of interested persons who wish to receive notice of rulemaking actions proposed by the department or commission. Persons who wish to have their name added to the list shall make written request that includes the name and mailing address of the person to receive the notice and specifies the subject or subjects about which the person wishes to receive notice. Such written request may be mailed or delivered to Fish, Wildlife and Parks, Legal Unit, P.O. Box 200701, 1420 East Sixth Avenue, Helena, MT 59620-0701, faxed to the office at (406) 444-7456, or may be made by completing the request form at any rules hearing held by the department.

8. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

9. The special notice requirements of 2-4-303, MCA have been met. All committee members and staff of the Environmental Quality Council, with addresses provided on the Montana Legislature's website (leg.mt.gov), were contacted by e-mail on December 29, 2022.

/s/ Hank Worsech
Hank Worsech
Director
Department of Fish, Wildlife and Parks

/s/ Kathleen Jensen
Kathleen Jensen
Rule Reviewer

Certified to the Secretary of State December 29, 2022.

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 24.17.127 pertaining to prevailing wages	)))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On October 7, 2022, the Department of Labor and Industry (department) published MAR Notice No. 24-17-397 pertaining to the public hearing on the proposed amendment of the above-stated rule at page 2006 of the 2022 Montana Administrative Register, Issue Number 19.

2. The department held a public hearing in Helena on November 18, 2022, over the Zoom videoconference and telephonic platform at which no members of the public commented. Written comments were received during the public comment period.

3. The department has thoroughly considered the comments made. A summary of the comments and the department's responses are as follows:

COMMENT 1: A commenter questioned why the description of roofing duties was not present.

RESPONSE 1: The comment is noted and the duties are included in the adoption as set forth below.

COMMENT 2: Several commenters requested information about the means by which wage rates are calculated, the timing of calculations, and wondered why the rates did not reflect significant increases based on inflation.

RESPONSE 2: The department sets wage rates by the means set forth in statute and rule. See 18-2-413, 18-2-414, and 18-2-415, MCA; ARM 24.17.119, 24.17.120, 24.17.121, and 24.17.122. As a result, increases in adopted wage rates are reflected only where those wages have actually increased in payments made by employers.

COMMENT 3: A commenter noted the variations across crafts in zone pay and travel structure make it cumbersome to account for the proper payments. The commenter proposed to maintain the 2022 rates for highway construction or adopt federal general decision number MT20220080.

RESPONSE 3: Zone pay, travel, and per diem for highway construction services were set in accordance with administrative rule and statute. See Response 2. Rate setting methodology since 2014 has been to conduct the annual survey. The department is willing to engage in discussions regarding rate setting methodologies

to determine whether another approach might be considered outside the present rate adoption.

4. The following rates in the "Montana Prevailing Wage Rates for Building Construction Services 2023" publication, incorporated by reference in the rule, have been amended as follows, stricken matter interlined, new matter underlined:

Carpenters

	Wage	Benefit
District 1	~~$26.50~~ 26.12	~~$14.07~~ 12.00

Construction Equipment Operators 2

	Wage	Benefit
District 1	~~$26.63~~ 26.95	~~$12.92~~ 9.50

Construction Equipment Operators 2

	Wage	Benefit
District 2	~~$33.68~~ 33.32	~~$9.48~~ 9.44

Construction Equipment Operators 2

	Wage	Benefit
District 3	~~$29.33~~ 27.99	$12.92

Construction Laborers Group 2

	Wage	Benefit
District 1	~~$21.19~~ 21.63	$ 6.58 ~~7.43~~

Construction Laborers Group 2

	Wage	Benefit
District 2	~~$20.26~~ 20.07	~~$10.30~~ 9.82

Construction Laborers Group 2

	Wage	Benefit
District 3	~~$24.63~~ 22.91	$11.82

Construction Laborers Group 2

	Wage	Benefit
District 4	~~$21.04~~ 20.71	~~$7.61~~ 7.93

Construction Laborers Group 4

	Wage	Benefit
District 3	$22.44	~~$11.82~~ 12.22

Construction Laborers Group 4

	Wage	Benefit
District 4	~~$24.60~~ 21.38	~~$11.82~~ 12.22

Painters: Including Paperhangers

	Wage	Benefit
District 1	$24.20	~~$7.62~~ 7.61

Painters: Including Paperhangers

	Wage	Benefit
District 2	~~$22.98~~ 23.10	~~$7.59~~ 7.61

Roofers

Duties Include:

~~Metal roofing. Excludes prefabricated metal buildings.~~

Metal roofing, covers roofs, walls and foundations with water proofing, insulation and vapor barriers in addition to metal flashings. Roofing includes shingles, low slope membranes, metal roofs, insulation, spray foam, coatings and vapor barriers. Wall coverings include metal panels, insulated metal panels and other waterproofing or rain screen systems. Foundation systems include waterproofing and insulation. Excludes prefabricated metal buildings.

Truck Drivers

	Wage	Benefit
District 2	~~$23.54~~ 23.80	~~$5.98~~ 6.13

Truck Drivers

	Wage	Benefit
District 3	~~$23.54~~ 23.80	~~$5.98~~ 6.13

Truck Drivers

	Wage	Benefit
District 4	~~$23.54~~ 23.80	~~$5.98~~ 6.13

5. The following rates in the "Montana Prevailing Wage Rates for Heavy Construction Services 2023" publication, incorporated by reference in the rule, have been amended as follows, stricken matter interlined, new matter underlined:

Construction Operators Group 2

Wage	Benefit
~~$29.69~~ 29.70	~~$13.65~~ 13.80

Construction Operators Group 3

Wage	Benefit
$30.65	~~$13.65~~ 13.80

Construction Operators Group 5

Wage	Benefit
$31.75	~~$13.65~~ 13.80

Construction Operators Group 6

Wage	Benefit
$32.75	~~$13.65~~ 13.80

Construction Operators Group 7

Wage	Benefit
$33.75	~~$13.65~~ 13.80

Construction Laborers Group 2

Wage	Benefit
~~$26.43~~ 26.40	$11.82

6. The following rates in the "Montana Prevailing Wage Rates for Highway Construction Services 2023" publication, incorporated by reference in the rule, have been amended as follows, stricken matter interlined, new matter underlined:

Construction Laborers Group 2

Wage	Benefit
~~$23.97~~ 25.01	$11.82

Pilot Car Drivers

Wage	Benefit
~~$29.14~~ 22.39	$12.92

7. The following rates in the "Montana Prevailing Wage Rates for Nonconstruction Services 2023" publication, incorporated by reference in the rule, have been amended as follows, stricken matter interlined, new matter underlined:

Tree Trimmers and Pruners

	Wage	Benefit
District 1	~~$27.18~~ 32.14	~~12.62~~ 14.89
District 2	~~$27.18~~ 30.18	~~12.62~~ 9.78
District 3	~~$25.29~~ 30.18	~~12.50~~ 9.78
District 4	~~$28.64~~ 30.18	10.28

8. The department has amended ARM 24.17.127 as proposed.

/s/ QUINLAN L. O'CONNOR
Quinlan L. O'Connor
Alternate Rule Reviewer

/s/ LAURIE ESAU
Laurie Esau, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State January 3, 2023.

BEFORE THE DEPARTMENT OF PUBLIC SERVICE REGULATION
OF THE STATE OF MONTANA

In the matter of the adoption of New Rules I through VI and the repeal of ARM 38.5.2001, 38.5.2002, 38.5.2003, 38.5.2004, 38.5.2005, 38.5.2006, 38.5.2007, 38.5.2008, 38.5.2009, 38.5.2010, 38.5.2011, 38.5.2012, 38.5.2016, 38.5.8201, 38.5.8202, 38.5.8203, 38.5.8204, 38.5.8209, 38.5.8210, 38.5.8211, 38.5.8212, 38.5.8213, 38.5.8218, 38.5.8219, 38.5.8220, 38.5.8221, 38.5.8225, 38.5.8226, 38.5.8227, and 38.5.8229 pertaining to resource planning	)	NOTICE OF ADOPTION AND REPEAL

TO: All Concerned Persons

1. On July 22, 2022, the Department of Public Service Regulation published MAR Notice No. 38-5-256 pertaining to the public hearing on the proposed adoption and repeal of the above-stated rules at page 1229 of the 2022 Montana Administrative Register, Issue Number 14. On November 4, 2022, the department published an Amended Notice and Extension of Comment Period on the proposed adoption and repeal at page 2159 of the 2022 Montana Administrative Register, Issue Number 21.

2. The department has repealed the following rules as proposed in the July 22, 2022 original notice: ARM 38.5.2001, 38.5.2002, 38.5.2003, 38.5.2004, 38.5.2005, 38.5.2006, 38.5.2007, 38.5.2008, 38.5.2009, 38.5.2010, 38.5.2011, 38.5.2012, 38.5.2016, 38.5.8201, 38.5.8202, 38.5.8203, 38.5.8204, 38.5.8209, 38.5.8210, 38.5.8211, 38.5.8212, 38.5.8213, 38.5.8218, 38.5.8219, 38.5.8220, 38.5.8221, 38.5.8225, 38.5.8226, 38.5.8227, and 38.5.8229.

3. The department has adopted the following rules as proposed in the November 4, 2022 amended notice, but with the following changes from the amended notice, new matter underlined, deleted matter interlined:

NEW RULE I (38.5.2020) GOAL AND POLICY (1) Integrated least-cost resource planning and acquisition is an ongoing, dynamic, and flexible process that:

(a) through (d) remain as proposed.

(e) is transparent and reasonably understandable to stakeholders, the public, and the Ccommission.

(2) and (3) remain as proposed.

(4) The rules implement the Ccommission's regulatory objective of ensuring an efficient allocation of society's resources to provide adequate, reliable electricity

services and just and reasonable rates for consumers at the lowest long-term total cost. In furtherance of this objective, utilities shall operate existing resources and acquire new resources only when needed and in a manner consistent with these rules.

(5) and (6) remain as proposed.

(7) Integrated least-cost resource planning consistent with the rules may demonstrate that previously rate-based resources should be abandoned and replaced by new resources. If such situations occur, the Ccommission will determine the appropriate recovery of undepreciated, rate-based capital costs in separate, contested case proceedings.

(8) and (9) remain as proposed.

AUTH: 69-3-1204, 69-3-1206, MCA
IMP: 69-3-1204, 69-3-1205, 69-3-1206, 69-3-1207, 69-3-1209, MCA

NEW RULE II (38.5.2021) DEFINITIONS (1) and (2) remain as proposed.

(3) "Affiliate" means, for purposes of this rule, ~~a person or organization officially attached to a utility through common ownership, common management, or the existence of a contract.~~ a parent, subsidiary, division, or the like, regardless of designation, owning or controlling the utility, owned or controlled by the utility, under common ownership with the utility, or under common control with the utility.

(4) through (10) remain as proposed.

~~(11) "Qualifying facility" means a resource as defined in 18 CFR part 292.101, and certified by the Federal Energy Regulatory Commission.~~

(12) through (16) remain as proposed but are renumbered (11) through (15).

AUTH: 69-3-1204, 69-3-1206, MCA
IMP: 69-3-1204, 69-3-1205, 69-3-1206, 69-3-1207, 69-3-1209, MCA

NEW RULE III (38.5.2022) PLAN CONTENTS (1) Resource plans shall contain at least the following information:

(a) A description of any changes a utility has made to the content of its plan or its planning process in response to the Ccommission's comments on its last plan and how the changes affect the current plan, along with reasoned explanations for any Ccommission comment with which the utility disagrees. Cross-references shall be provided for all changes.

(b) through (f) remain as proposed.

(g) A resource adequacy assessment based on existing resources and a description of the nature of the need for additional resources to achieve industry-standard adequacy standards or reserve margin requirements. The plan must completely and thoroughly describe the method(s) and assumptions used in the assessment, including the basis for the adequacy standard or reserve margin requirement and computer modeling and model validation procedures. The assessment must document energy and capacity deficits, their duration, frequency, and timing, given the energy and demand forecasts in (b) and resource capabilities in (d) and (f). In addition, the assessment must document energy and capacity deficits for scenarios that involve higher and lower forecasts of energy and demand

requirements; alternative ~~energy and demand~~ load profiles; and alternative performance levels for existing resources to account for the effects of, among other things, extreme weather events; demand-side and distribution-side resources; electrification; and price response.

(h) and (i) remain as proposed.

(j) For computer modeling used to perform the evaluation in (i):

(i) through (iii) remain as proposed.

(iv) ~~sufficient information on modeling inputs and outputs to reasonably permit alternative modeling in another program~~ comprehensive descriptions of and data for modeling outputs and results; ~~and~~

(v) ~~sufficient explanation of the modeling results to enable the commission and stakeholders to understand the results~~ comprehensive, understandable explanations of the modeling results~~.~~; and

(vi) a thorough description of the process by which a stakeholder can obtain inputs electronically in order to conduct alternative modeling.

(k) through (2) remain as proposed.

AUTH: 69-3-1204, MCA
IMP: 69-3-1204, 69-3-1205, 69-3-1206, 69-3-1207, 69-3-1208, 69-3-1209, MCA

NEW RULE IV (38.5.2023) PLANNING PROCESS (1) through (4) remain as proposed.

(5) A utility shall publish a draft of its resource plan at least 70 days before filing the resource plan with the C~~c~~ommission and accept comments on the draft resource plan for at least 55 days.

(6) remains as proposed.

AUTH: 69-3-1204, MCA
IMP: 69-3-1204, 69-3-1205, 69-3-1208, MCA

NEW RULE V (38.5.2024) RESOURCE PROCUREMENT (1) A utility's resource procurement processes shall be guided by the policy in 69-3-1202, MCA, input from the public and the advisory committee provided for in 69-3-1208, MCA, and comments of the C~~c~~ommission on the utility's most recent resource plan.

(2) remains as proposed.

(3) A utility shall notify the C~~c~~ommission of a decision to issue a competitive solicitation. The notice shall precede release of a draft of the solicitation by at least 20 days. Before issuing the solicitation, the utility shall submit a draft of the solicitation to the C~~c~~ommission in accordance with 69-3-1207, MCA, with a thorough description of the input and recommendations of the advisory committee regarding the solicitation process and how the utility modified the solicitation process in response to the advisory committee's input and recommendations or, alternatively, the basis for not modifying the process. Upon notification of a utility's intent to issue a solicitation, the C~~c~~ommission will open a docket for purposes of receiving the draft solicitation and accepting public comment on the draft solicitation. The C~~c~~ommission shall provide notice to the public of the receipt of the draft solicitation and provide 45 days for interested persons to file written comments. The utility shall

not issue the final solicitation until at least 70 days after submitting the draft solicitation. Upon issuing the final solicitation, the utility shall concurrently submit the solicitation to the Ccommission in the docket assigned to the draft solicitation.

(4) and (5) remain as proposed.

AUTH: 69-3-1204, MCA
IMP: 69-3-1204, 69-3-1205, 69-3-1207, 69-3-1208, 69-3-1209, MCA

NEW RULE VI (38.5.2025) REQUIREMENTS FOR COMPETITIVE SOLICITATIONS (1) A competitive solicitation issued by a utility shall treat similarly situated bidders similarly and fairly, use understandable processes, and result in decisions and outcomes that are transparent and understandable to bidders, stakeholders, and the Ccommission.

(2) remains as proposed.

(3) A utility's process for evaluating offers or bids in competitive solicitations shall:

(a) and (b) remain as proposed.

(c) apply a transparent and systematic rating methodology to objectively rank bids with respect to price and, as appropriate, non-price factors. Non-price factors must be objectively quantifiable where practicable. The rating methodology shall be based on information and analyses from a utility's most recent resource plan, any Ccommission comments on the plan, input from the advisory committee, public comments on the utility's draft solicitation, if applicable, input from a third-party administrator, and industry best practices;

(d) through (6) remain as proposed.

(7) If a utility acquires resources involving affiliate transactions it shall be subject to the following filing requirements in any subsequent application regarding cost recovery under 69-3-301 through 69-3-310, MCA:

(a) through (c) remain as proposed.

(d) an affirmation that books of account and related records of any affiliate transacting business with the utility shall be available for audit and review by the Ccommission. As reasonable and necessary and when lawful, the Ccommission will protect affiliate information from public disclosure; and

(e) and (8) remain as proposed.

(9) The consumer counsel should consider the following guidelines when it decides to engage an independent monitor pursuant to 69-3-1207(4), MCA:

(a) notify the Ccommission as soon as practicable following notice by a utility of a decision to issue competitive solicitation if the consumer counsel intends to retain an independent monitor; and

(b) provide information needed and requested by the Ccommission to establish the process by which the Ccommission will charge a fee to the utility to pay costs incurred by the consumer counsel related to the independent monitor.

(10) through (12) remain as proposed.

AUTH: 69-3-1204, MCA
IMP: 69-3-1204, 69-3-1205, 69-3-1207, 69-3-1208, 69-3-1209, MCA

4. The department thoroughly considered the comments and testimony received on the original proposal notice. A summary of the comments received on the original proposal notice and the department's responses to those comments are set forth in Comment #1/Response #1 through Comment #41/Response #41 below. The revisions mentioned in Response #1 through Response #41 can be found in the November 4, 2022 amended notice.

COMMENT #1: Multiple comments suggest that the proposed rules do not adequately implement the legislative intent and/or explicit directives of HB 597. These comments emphasize provisions in the statute that establish a state policy requiring efficient utility rates. They note that fulfilling that policy requires the Commission to effectively implement the provisions in the statute that establish a state policy encouraging utilities to acquire resources using a competitive solicitation process. They further note that through HB 597 the Legislature sought to promote the use of fair and transparent competitive solicitation processes to counter the inherent bias of utilities to build and own their own resources and to put utility and non-utility independent power producer resources on a level playing field. The comments state that HB 597 is designed to minimize the cost to provide utility consumers with adequate and reliable service by stimulating effective competition and the proposed rules do not sufficiently implement the bill's intent.

RESPONSE #1: The Commission appreciates these comments and generally agrees. The Commission recognizes that HB 597 articulates a clear policy of encouraging utilities to acquire resources using competitive solicitation processes and that effective competitive solicitation processes can promote efficient utility rates. The Commission agrees that to be effective, competitive solicitation processes must instill confidence in potential bidders and stakeholders that the process will be conducted objectively and transparently and treat all bidders fairly. There would be no effect from the state's policy of encouraging utilities to use competitive solicitations if, in creating the policy, the Commission were not authorized to adopt rules ensuring that when utilities conduct solicitations, they do so in a manner that maximizes the likelihood of obtaining lower costs and more efficient rates for consumers. The Commission agrees, therefore, that revisions to the proposed rules are appropriate to fully implement state policy. These revisions are discussed in responses to specific comments below.

COMMENT #2: Several comments state that the permissive, non-binding terms in the proposed rules prevent the rules from fulfilling both the intent and the specific requirements of HB 597. The comments recommend converting these permissive, non-binding terms to requirements.

RESPONSE #2: The Commission agrees. As discussed in Response #1, the Commission finds that to effectuate the state's policy of encouraging utilities to use competitive solicitations, utility solicitations, when used, must involve robust competition and fair and objective analysis of bids to produce lower costs and more efficient rates for consumers. The Commission concludes that specifying requirements for procurement processes and competitive solicitations will be more

effective than providing guidelines, and better implements state policy. The Commission has revised the proposed rules by replacing permissive terms with mandatory terms throughout the rules.

COMMENT #3: Several comments recommend adding back a rebuttable presumption included in preliminary drafts of the rule that resources with certain characteristics are not in the public interest if they are not acquired using a competitive solicitation process. The comments suggest this revision will more effectively encourage use of competitive solicitations.

RESPONSE #3: The Commission declines to make this revision. The regulated community rightly pointed out in response to preliminary drafts that there is no basis in statute to create a rebuttable presumption against opportunity resources. In addition to establishing a policy encouraging utilities to acquire resources using competitive solicitations, HB 597 exempted opportunity resources from the competitive solicitation process. Given this exemption, there is no statutory basis for creating a rebuttable presumption to discourage opportunity resources.

When a utility applies to recover through rates the costs of acquiring a resource, the utility bears the burden of proving by a preponderance of evidence that the acquisition is in the public interest. This "preponderance of evidence" standard also applies to overcome a rebuttable presumption under Montana Rule of Evidence 301. Although it has not created a rebuttable presumption in rule, the Commission still expects utilities to prove by a preponderance of evidence that their decisions regarding resource acquisition are in the public interest.

The Commission further concludes that it is reasonable and consistent with state policy to require utilities to use transparent, independently administered competitive solicitations whenever practicable, subject to the exceptions in 69-3-1207, MCA, and has revised the rules accordingly. Although opportunity resources can be in the public interest, competitive solicitations, properly conducted, provide a systematic and transparent method of ensuring that acquired resources are truly least-cost.

COMMENT #4: Several commenters recommend adding requirements for utility solicitations to include sufficient information regarding bid evaluation and scoring so that the process is transparent and so bidders and others can be confident in the fairness of the results.

RESPONSE #4: For reasons explained in Responses #1 and #2, the Commission agrees and has revised NEW RULE VI (38.5.2025) based on these comments. In particular, the Commission believes revisions to (3)(d) provide a reasonable opportunity for bidders to predict how their bids will be scored on both price and non-price factors.

COMMENT #5: Several commenters recommend requiring Commission certification of a utility's competitive solicitation as compliant with the rules.

RESPONSE #5: The Commission declines to include this revision. A formal Commission decision on compliance with a rule necessitates a contested case proceeding. There is no basis in the statute for the Commission to conduct a contested case proceeding on a utility's competitive solicitation prior to the utility issuing the solicitation. Section 69-3-1207, MCA, authorizes the Commission to accept public comment on a draft of a utility's solicitation. To impose a requirement for preapproval by the Commission of a utility's solicitation would exceed what the statute authorizes. Instead, the docket the Commission initiates pursuant to NEW RULE V (38.5.2024) to receive the utility's draft solicitation, accept public comments on the draft, and receive the utility's final solicitation provides an opportunity to create a record of any perceived deficiencies in the solicitation that will be available to the Commission and parties in subsequent contested case proceedings involving rate recovery for resources that may be acquired through competitive solicitations.

COMMENT #6: Some comments recommend adding back the cost-effectiveness standard for opportunity resources included in preliminary drafts of the rules.

RESPONSE #6: The Commission declines to add a specific cost-effectiveness standard for opportunity resources. The Commission's proposed rules contain a general definition of "cost-effective." The Commission believes that definition establishes an adequate basis for evaluating the cost-effectiveness of opportunity resources as well as other resources, including those acquired through competitive solicitation processes.

COMMENT #7: Multiple comments express concern that structural and organizational changes in the proposed rule compared to preliminary drafts resulted in the omission of important elements in NEW RULE III (38.5.2022). The comments stated that the proposed rules are too general and lack the specificity of preliminary drafts and, consequently, the proposed rules will result in utility resource plans and planning processes that are not optimal.

RESPONSE #7: The Commission agrees in part and disagrees in part. The Commission has revised NEW RULE III (38.5.2022) in several respects as discussed in more detail in response to specific comments below.

COMMENT #8: A comment recommends including a requirement for utilities to provide a comparison of the planning assumptions in the utility's prior three plans to actual historical data. According to the comment, without such information the Commission and others will not have a sense of whether the assumptions in the present plan should be scrutinized through sensitivity testing.

RESPONSE #8: Although the Commission agrees that the planning process should involve a thorough analysis of assumptions, including, where useful, a review of how assumptions in prior plans have fared against reality, the Commission declines to include the proposed revision. The Commission finds the rule included in preliminary drafts vague and potentially burdensome. Some planning assumptions may not involve "values" that can be compared to "historical data." It is further

unclear whether comparing assumptions that are nine or more years old will always be useful. The Commission agrees that assumptions are critical to the planning analysis and that they should be fully assessed in the planning process. The Commission believes the enhancements to the planning process, including the required work plan and structured information exchange, provide a reasonable mechanism for the advisory committee to ensure planning assumptions are thoroughly vetted or to identify deficiencies in the event they are not. The Commission concludes that it is reasonable to expect a resource plan to justify planning assumptions and has revised the requirements in NEW RULE III (38.5.2022) accordingly. To the extent a comparison to historical values is necessary to justify present planning assumptions, this revision is responsive to the comment.

COMMENT #9: Some comments state that the proposed rules fail to specify dynamic conditions currently affecting the industry that should be considered in forecasting electricity usage.

RESPONSE #9: The Commission believes the rules require sufficient transparency regarding the development of a utility's load forecasts. That transparency empowers the advisory committee to identify where a utility's forecasting may not adequately account for any current industry conditions with the potential to affect future loads. The Commission is generally concerned that including a partial list of potentially relevant examples of current industry conditions could discourage utilities from considering other, unlisted conditions. However, the Commission has added several examples in NEW RULE III (38.5.2022)(1)(g), and encourages utilities to consider other conditions as necessary.

COMMENT #10: Several comments state that the rules should include a requirement to address alternatives that do not directly generate power.

RESPONSE #10: The Commission agrees and has revised NEW RULE III (38.5.2022) accordingly. For example, the Commission has included a requirement that utilities consider transmission system improvements that could open access to new resources.

COMMENT #11: Several comments recommend requiring utilities to provide specific details of the utility's planning model(s) in resource plans.

RESPONSE #11: The Commission agrees and has added provisions to NEW RULE III (38.5.2022) to incorporate the recommendations in the comments. Specifically, (1)(j) requires utilities to provide details about modeling used in resource planning.

COMMENT #12: A comment recommends requiring utilities to explain the techniques used to calculate avoided costs used to assess the cost-effectiveness of demand-side resources.

RESPONSE #12: The Commission agrees and has revised NEW RULE III (38.5.2022) (1)(k) to incorporate the recommendations in the comment.

COMMENT #13: Multiple comments state the proposed rules appear to be narrowly focused on the minimum criteria outlined in HB 597. The comments observed that resource planning and procurement rules have not been updated since 1992. The comments assert that the proposed rules would put Montana behind other states in the region and recommend more expansive rules with robust language based on the Commission's broad authority under 69-3-103, MCA.

RESPONSE #13: The Commission agrees in part. The Commission acknowledges that resource planning and procurement rules have not been updated recently, but notes that the Commission engaged in resource planning rulemaking in 2003 and 2008. As explained in Responses #1 and #2, the Commission also agrees that revisions to the proposed rules are appropriate to fully implement state policy and has revised the rules in an effort to update the rules and incorporate best practices when possible, consistent with Montana law.

COMMENT #14: Several comments express concern about the reasonableness of selecting a third-party administrator for competitive solicitations through competitive processes and whether requiring a third-party administrator would increase the cost burden to ratepayers.

RESPONSE #14: The Commission notes that the statute requires use of a third-party administrator selected by the utility in certain instances provided for in 69-3-1207(1)(c), MCA. The Commission agrees with comments that the purpose of a third-party administrator is to provide independence and objectivity in the evaluation of bids, which is particularly important when bids may include utility ownership or utility affiliate transactions. Similarly, the Commission believes providing for advisory committee input on the selection of a third-party administrator promotes greater transparency and confidence in the competitive solicitation process.

COMMENT #15: Several comments recommend providing greater opportunities for stakeholder feedback and participation through discovery in the planning process and access to utility planning models.

RESPONSE #15: The Commission agrees that revisions to the proposed rules are appropriate to provide for greater stakeholder engagement and has revised NEW RULE IV (38.5.2023) (4) to include requirements for the work plan, including a structured process for submission of written inquiries and comments to the utility during the planning process and written responses by the utility. The revisions also include a requirement for the utility to address procedures for access to the planning model during the planning process by the advisory committee. The Commission notes that the resource planning process is not a contested case, and there are no formally recognized intervenors, and as such, "discovery" in the traditional, legal sense is a poor fit for the process. The Commission therefore does not intend to consider and rule on motions, objections, or other disputes regarding the informal,

question-and-answer process provided in the revised rule. The Commission will instead leave it to utilities and stakeholders to work through any disputes, and will consider a utility's candor and information-sharing practices when preparing its own comments on a resource plan.

COMMENT #16: Comments recommend that the rules provide for an opportunity for discovery in the competitive solicitation process, including on reports submitted by the third-party administrator and independent monitor.

RESPONSE #16: Discovery is a tool best suited for contested cases. As explained in response to prior comments, there is no basis in the statute for the Commission to conduct a contested case proceeding on a utility's competitive solicitation prior to the utility issuing the solicitation. The docket the Commission initiates to receive the utility's draft solicitation, accept public comments on the draft, and receive the utility's final solicitation will provide a thorough record of any alleged deficiencies in the solicitation that will be available to the Commission and parties in a contested case involving rate recovery for any resources that result from the solicitation. Opportunities for discovery regarding the competitive solicitation process, including reports submitted by the third-party administrator and independent monitor, will exist in contested cases involving a utility's request for rate recovery for any resource acquired through a competitive solicitation.

COMMENT #17: Multiple comments propose longer comment periods in both the resource planning and competitive solicitation processes. Several comments recommended a 70-day process for competitive solicitations and a symmetrical 70-day process for draft resource plan, with a 55-day public comment period, to ensure sufficient time for public input and for the utility to review comments and incorporate changes before issuing a final solicitation or plan.

RESPONSE #17: The Commission agrees and has revised the rules accordingly.

COMMENT #18: A comment expresses concern that the definition of "societal cost" would result in unjust and unreasonable rates and proposes that the definition be removed.

RESPONSE #18: The Commission notes the definition of "societal cost" originates from ARM 38.5.2002, which is largely carried forward in NEW RULE II (38.5.2021), and that externalities are defined under 69-3-1203(6), MCA. The Commission further notes that it is generally not permitted to include in the cost of a new resource a bonus or adder to compensate for environmental externalities, as provided in 69-3-1206(3), MCA. The Commission has revised the rules for clarity, but disagrees with the assertion that the definition of societal costs and its use in the rules would force unknown and undefined costs into the cost calculations of economically optimal portfolios.

COMMENT #19: A comment recommends including the social costs of carbon in the definition of "societal cost" or "cost" and quantifying the emissions.

RESPONSE #19: The Commission appreciates this perspective but believes this inclusion would go beyond the intent of this rulemaking, which is to implement HB 597, and notes there has not been an internalized carbon dioxide cost in the state.

COMMENT #20: Comments raised questions about how the proposed definition of "cost-effective" would be applied to relevant Montana statutes and suggested more clearly defining "reliability" to ensure clarity on meeting the cost-effective threshold as defined in the rules. One comment suggested that the concepts of reliability and availability involve separate analysis outside of a cost-effectiveness determination and the proposed definition allows a utility to exclude a potential resource prior to a cost-effectiveness determination.

RESPONSE #20: The Commission disagrees. The Commission notes that the proposed definition of "cost-effective" mirrors the definition in the Northwest Power Act and has been applied for decades by the Northwest Power and Conservation Council (NWPCC) in the development of regional power plans. None of the commenters explained how the definition would allow a utility to exclude consideration of a plausibly cost-effective resource from the planning process or how the NWPCC has been forced to exclude resources due to the definition. Importantly, cost-effectiveness analysis always involves an objective; cost-effectiveness analysis answers the question: Given an objective, what is the least-cost way to achieve it? One commenter incorrectly states that "cost-effectiveness appropriately analyzes only whether a resource or measure saves money compared with an alternative." That statement is true only when paired with an objective, such as "while providing the same or comparable end use services." Comparing costs for alternatives without an objective is a meaningless exercise. The statutorily required objective of an electric utility is to provide adequate and reliable service at just and reasonable rates. Integrated least-cost resource planning and acquisition finds the least-cost way to achieve the statutory objective. In the context of integrated resource planning, it is not useful merely to compare the costs of one resource against another, for example the cost of a wind resource to a gas-fired generator on cost per kWh basis, and pick the one with the lower cost. Resources have different attributes that can combine in both complementary and antagonistic ways and cost-effectiveness is ultimately a function of the integration of potential new resources and existing resources. No resource is 100% reliable and the definition of "cost-effective" does not impose that standard on resources before they can be evaluated in the planning process. The Commission finds the concerns expressed in the comments are unwarranted. However, if an interested party believes there is a better way to define "cost-effective" in the context of integrated resource planning, the Commission invites that party to petition the Commission to modify the rule.

COMMENT #21: A commenter expresses concern that the statute requires an evaluation of the full range of cost-effective resources, but the proposed rules call for only a description.

RESPONSE #21: The Commission disagrees. NEW RULE III (38.5.2022) (1)(i) fully satisfies the statutory requirement to which the comment refers.

COMMENT #22: A comment recommends that the rules require utilities to provide meeting information and materials or presentations prior to advisory committee meetings to the extent practicable.

RESPONSE #22: The Commission agrees and has revised the rules accordingly.

COMMENT #23: Some comments state that NEW RULE I (38.5.2020) should be broken apart to differentiate between goals and policies.

RESPONSE #23: The Commission disagrees. Goals and policies are interrelated concepts. The Commission finds that it is both reasonable and appropriate to include them in a single rule. However, the Commission has revised language in this rule to further link planning and procurement, consistent with state policy.

COMMENT #24: Comments state the proposed rules should have addressed the Inflation Reduction Act (IRA) and its effects in planning and procurement decisions.

RESPONSE #24: The Commission notes that the IRA had not yet been enacted when the Commission published notice of its proposed rules. Further, the comments were not specific regarding how the rules should address the IRA. The Commission has not yet fully evaluated the IRA and is not prepared to revise the rules absent specific facts and proposals from commenting parties. The Commission invites stakeholders to petition the Commission to make specific revisions to the rules as appropriate.

COMMENT #25: A comment suggests that the utility should be required to negotiate a discounted licensing fee for stakeholders to perform modeling runs in the same software as the utility and directing the utility to absorb the costs.

RESPONSE #25: The Commission declines to make this revision. The determination of discounted licensing fees, procedures for accessing modeling, and who bears the burden of paying for new modeling runs requires further fact development through the advisory committee process, a commission investigation, or another proceeding outside this rulemaking.

COMMENT #26: A comment questions whether the definition of "cost" included capital costs.

RESPONSE #26: The Commission believes the definition of "cost" in the proposed rules included capital costs but has revised the rules to provide more clarity.

COMMENT #27: A comment recommends providing definitions for "long-term" and "affiliate" since the words are used throughout the rules.

RESPONSE #27: The Commission agrees and has updated NEW RULE II (38.5.2021) to include those definitions.

COMMENT #28: Multiple comments express concern that the proposed rules limit stakeholders.

RESPONSE #28: As explained in responses to prior comments, the Commission has revised the rules regarding a utility's advisory committee and stakeholder engagement in response to the concern. In particular, the Commission will now require utilities to provide a structured process for submitting written questions and receiving written responses, which may be used in future proceedings.

COMMENT #29: A commenter suggests non-bidder stakeholders should have access to confidential information subject to protective order in a competitive solicitation process.

RESPONSE #29: The Commission appreciates this comment and agrees transparency is important in the competitive solicitation process; however, the Commission believes questions of access to confidential information should be resolved on a case-by-case basis, considering the nature of the information and balancing the public and private interests involved. Further, the Commission has an affirmative duty to review alleged confidential records at the time of filing and make an independent determination of confidentiality. The Commission cannot make such a determination in rule, in advance of any filings.

COMMENT #30: The Commission also received comments from the sponsor of HB 597, who generally opposed the proposed rules. The sponsor described the rules as "extremely permissive and subject to utility interests." The sponsor's request to eliminate permissive language throughout the rules has been adopted in the revisions shown above. The sponsor also stated that the intent of HB 597 was to provide "a fair, competitive, and free market solicitation process based on national standards that allows for fair competition to select the most affordable resource that fit[s] the need."

RESPONSE #30: The Commission appreciates the sponsor's perspective and has replaced permissive "should" language throughout the rules with mandatory "shall" and "must" language. While HB 597 established a state policy encouraging the use of competitive solicitations and required their use when a utility seeks preapproval under 69-8-421, MCA, the Commission also recognizes that the law did not require the use of competitive solicitations in all circumstances, including the acquisition of opportunity resources. As detailed below, the Commission has made additional changes in response to specific requests from the sponsor.

COMMENT #31: The sponsor of HB 597 requested that the Commission carry forward language that currently exists in ARM 38.5.2001(9), (10), and (11).

RESPONSE #31: Current ARM 38.5.2001(10) is reflected in NEW RULE I (38.5.2020), in the renumbered (9). Current ARM 38.5.2001(9) required utilities to thoroughly document the exercise of its judgment in resource planning. NEW RULE II (38.5.2021) and NEW RULE III (38.5.2022) accomplish the same goal with greater specificity. Current ARM 38.5.2001(11) discussed the need for a "commitment from both the public and private sectors to honor the spirit and intent of the guidelines." In this rulemaking, the Commission has opted to provide clearer, more granular requirements, rather than relying on "the spirit and intent of the guidelines."

COMMENT #32: The sponsor of HB 597 asked the Commission to include a statement that the "Commission strongly encourages utilities to acquire resources using competitive solicitations" as part of NEW RULE I (38.5.2020).

RESPONSE #32: The Commission declines to adopt this change, since such a statement is largely unenforceable as a rule. Instead, the Commission has incorporated this concept by adding (6) in NEW RULE I (38.5.2020), which requires utilities to acquire resources through transparent, independently administered competitive solicitations whenever practicable, subject to the limitations of HB 597, which were codified in 69-3-1207, MCA.

COMMENT #33: The sponsor requested additions to the definitions included in NEW RULE II (38.5.2021), including an expanded list of "costs" and definitions for "long-term" and "affiliate."

RESPONSE #33: The Commission has largely adopted the sponsor's requested definitions. The Commission further notes that the costs listed in this definition are not intended as an exhaustive list.

COMMENT #34: Regarding NEW RULE III (38.5.2022), the sponsor requested that the Commission include certain statutory language from 69-3-1209, MCA, pertaining to avoided costs and the techniques used to estimate those costs.

RESPONSE #34: Pursuant to 2-4-305, MCA, the Commission's rules "may not unnecessarily repeat statutory language." The Commission therefore did not propose to repeat elements of the language adopted by HB 597 in its proposed rules. This does not mean, however, that the Commission does not intend to enforce the requirements of Montana law. In response to the sponsor's comments, the Commission has reiterated language from the statute in NEW RULE III (38.5.2022) (1)(f)(iv).

COMMENT #35: The sponsor also requested that the Commission revise NEW RULE III (38.5.2022) (1)(k), (1)(l), and (1)(m) to include additional details about a utility's responses to feedback in the planning process and future plans for acquiring resources.

RESPONSE #35: The Commission has incorporated the spirit of the sponsor's requests for additional details in (1)(l) and (1)(m) of NEW RULE III (38.5.2022),

which requires utilities to describe their responses and reactions to comments and input in public meetings and in response to draft resource plans. The Commission has included the sponsor's requested revision striking the word "substantial" in (1)(k) of NEW RULE III (38.5.2022). The Commission has not included the sponsor's requested edits in (1)(n) as the Commission believes the existing language achieves the same result in fewer words. Both the sponsor's request and the rule as adopted require the utility to describe the process it intends to use to acquire resources, including the use of competitive solicitations.

COMMENT #36: The sponsor requested that the Commission include a process for stakeholders to issue data requests after a utility's plan is submitted.

RESPONSE #36: The Commission notes that resource planning is not a contested case, and as such, there are no intervenors with rights to conduct discovery in the traditional, legal sense. Instead, the Commission has added in NEW RULE IV (38.5.2023) (4) a requirement for utilities to provide a process for written questions and answers, which may be referred to in future proceedings. The Commission also reiterates that it has broad investigative authority, and nothing in these rules limits the Commission's investigative authority.

COMMENT #37: The sponsor requested that the Commission require utilities to make proprietary modeling software used in preparing resource plans available to stakeholders by negotiating a licensing fee that permits stakeholders to perform their own modeling. The sponsor cites the requirement in 69-3-1204(2)(b), MCA, that utilities "fully explain, justify, and document the data, assumptions, methodologies, models, determinants, and any other inputs on which it relied to develop" their resource plans.

RESPONSE #37: As discussed in response to prior comments, the Commission has added detailed requirements of utilities to satisfy the statutory requirement of fully explaining, justifying, and documenting its use of a proprietary model. The Commission's rule provides transparency and follows the plain language of the statute, without subjecting utilities and their customers to unknown licensing costs associated with stakeholders' access to run alternative simulations within the model. The Commission has also revised the rule to require utilities to consult with their advisory committees about providing access to proprietary models.

COMMENT #38: Regarding NEW RULE IV (38.5.2023), the sponsor asked the Commission to repeat in its rule elements of statutory language from 69-3-1208, MCA, concerning the makeup of the advisory committee and the two public meetings a utility is required to host.

RESPONSE #38: The Commission believes the requirements of the statute are incorporated in the rule's reference to "an advisory committee according to 69-3-1208, MCA." Similarly, the Commission declines the sponsor's request to repeat the statutory requirement that the utility hold two public meetings on its resource plan. The Commission intends to enforce the meeting requirement as provided in statute.

Through this rule, the Commission has detailed specific notice requirements, which will provide the public an opportunity to meaningfully participate in the statutory meetings. The Commission has also generally incorporated the sponsor's requests for revisions that replace permissive language with mandatory language throughout NEW RULE IV (38.5.2023).

COMMENT #39: The sponsor described NEW RULE V (38.5.2024) as "extremely disappointing" and said the rule was too permissive to carry out the purpose of the statute. The sponsor further asks the Commission to establish in rule a rebuttable presumption that procurement of certain power resources outside of competitive solicitation is not in the public interest.

RESPONSE #39: The Commission has revised NEW RULE V (38.5.2024) (2) to require utilities to acquire needed resources through competitive solicitations whenever practicable, subject to 69-3-1207, MCA. The Commission believes this matches the scope of the competitive solicitation requirement outlined in 69-3-1207, MCA. For the reasons described in response to prior comments, the Commission declines to establish a rebuttable presumption that resources acquired outside of a competitive solicitation are not in the public interest. The limits established in 69-3-1207(1) and (5), MCA, do not support such a presumption. Furthermore, the utility will continue to bear the burden of proving by a preponderance of the evidence that an acquisition is in the public interest. Failing to carry that burden of proof would result in the denial of rate recovery.

COMMENT #40: The sponsor requested that the Commission apply to opportunity resources the standards used for evaluating avoided costs in the context of the Public Utility Regulatory Policies Act (PURPA).

RESPONSE #40: The Commission appreciates the sponsor's perspective, but declines to adopt this change at this time. The discussion of opportunity resources in HB 597 exempted those resources from the competitive solicitation requirement, but it did not otherwise prescribe how the Commission should evaluate those resources. The Commission is currently undertaking rulemaking under PURPA that may revise the way avoided costs are calculated in that context. To the extent PURPA requires the Commission to apply the same evaluation methods to both opportunity resources and qualifying facilities under PURPA, the Commission believes the more appropriate venue to reach that conclusion is in a contested case with the benefit of full legal briefing. Finally, the Commission believes that the definition of "cost-effectiveness" adopted in these rules provides a sufficient basis for evaluating opportunity resources.

COMMENT #41: Regarding NEW RULE VI (38.5.2025), the sponsor asked the Commission to make certain revisions to improve fairness and transparency in the competitive solicitation process.

RESPONSE #41: As discussed in response to prior comments, the Commission has revised NEW RULE VI (38.5.2025) to shift guidelines to requirements, to the

extent allowed by law. The Commission agrees with the sponsor and other commenters that bidding in competitive solicitations could be curtailed by the perception that the process is not open and fair. To that end, the Commission's revisions incorporate elements of the sponsor's proposed language, and require utilities to provide a more detailed discussion of the objective criteria and rubrics used to evaluate both price and non-price factors. The Commission has also revised the rule to include more details regarding the role of a third-party administrator, when one is required by statute. Finally, the Commission has reorganized the rule to group together requirements that arise from the possibility of a utility or its affiliate submitting a bid in the utility's own competitive solicitation.

5. The department thoroughly considered the comments received on the amended notice. A summary of the comments received on the amended notice and the department's responses are as follows:

COMMENT #42: A comment recommended either substituting the language in New Rule I(4) with the term "lowest long-term total cost" or incorporating the language of New Rule I(4) into New Rule III(1)(i) as presently written.

RESPONSE #42: The Commission has revised New Rule I(4) to incorporate the term "lowest long-term total cost."

COMMENT #43: A comment stated the language regarding long-term societal costs in New Rule I is too vague.

RESPONSE #43: The Commission has revised language in that rule to refer to long-term total costs, including scenarios based on societal costs. The term "societal cost" is defined in New Rule II and accommodates the commenter's example of the social cost of carbon.

COMMENT #44: A comment recommended supplementing the language requiring the filing of a resource plan every three years.

RESPONSE #44: The Commission appreciates this comment but believes the statutory definition of "planning period" includes the commenter's recommended language.

COMMENT #45: One comment suggests including annual emissions of carbon dioxide in New Rule III(1)(d) for proposed new resources.

RESPONSE #45: The Commission declines to adopt this change because the suggested language is included in New Rule III(1)(h) and (p) as well as in New Rule VI(5)(d).

COMMENT #46: One comment recommended adding language in New Rule III(1)(h) to require an evaluation of emerging energy resources that are free of

carbon emissions and when these resources are likely to become feasible resource additions.

RESPONSE #46: The Commission declines to make this revision. The Commission appreciates this perspective and believes that New Rule III already requires consideration of emerging energy technologies to the extent they are or may become plausibly cost-effective during the planning period.

COMMENT #47: One comment stated that the use of the term "shall" is inconsistent with New Rule I (38.5.2020) and makes the rule unworkable. According to the commenter, goals and policies describe where effort should be directed and are not commands or requirements.

RESPONSE #47: The Commission disagrees that using the term "shall" with a rule addressing goals and policies is unworkable. It is often necessary to satisfy requirements to achieve goals – if one has a goal to become a doctor, one is required to complete medical school. Similarly, achieving Montana's policy goals of efficient utility operations, efficient use of utility services, and efficient rates requires completing certain planning evaluations and procurement processes. The Commission agrees with the comments on the initially proposed rule that permissive, non-binding terms prevent the rules from fulfilling both the intent and the specific requirements of HB 597, as explained in the response to Comment #2.

COMMENT #48: One comment stated that requiring the utility to provide competitive solicitation scoring criteria and a sample evaluation to potential bidders is "teaching to the test," and that it is not an industry best practice.

RESPONSE #48: The Commission disagrees. The commenter, a public utility, provided no basis for the assertion that the proposed rule departs from best practices. Further, the commenter bears the burden of providing evidence that rules that require more transparency into bid evaluation processes are less successful. The Commission disagrees that requiring solicitations to provide scoring criteria and a sample evaluation rubric to potential bidders is not an industry best practice. Multiple studies have determined that effective competitive solicitation processes require regulatory oversight that instills confidence in participants that their bids will be considered fairly and objectively. In addition, to encourage robust competition, solicitations must provide prospective bidders adequate information about bidder requirements, evaluation procedures, product specifications, and other factors that affect the resources that are offered. Moreover, these studies are not new. See, for example, *Competitive Procurement of Retail Electricity Supply: Recent Trends in State Policies and Utility Practices*, The National Association of Regulatory Utility Commissioners, July 2008; *How to Build Clean Energy Portfolios: A Practical Guide to Next-Generation Procurement Practices*, RMI, 2020.

COMMENT #49: One comment expressed concerns that the rules prohibit a utility from initiating a proceeding to address cost recovery of undepreciated, rate-based capital costs.

RESPONSE #49: The Commission disagrees. Nothing in the proposed rules prevents a utility from filing an application; ARM 38.5.2020(7) merely states that the determination of the appropriate cost recovery will be determined in a separate contested case proceeding and not in the review of a utility's resource plan.

COMMENT #50: One comment contended that the rule prohibiting a utility from issuing a competitive solicitation until 70 days after submitting the draft solicitation is unreasonable and suggested a 30-day public comment period instead of 45.

RESPONSE #50: The Commission disagrees – robust and transparent stakeholder engagement in the procurement process is in line with the statute. The Commission also declines to make the revision to the public comment period. The 45-day public comment period coinciding with the 70-day draft solicitation process will provide meaningful stakeholder input and allow the utility enough time to modify the draft solicitation based on feedback if necessary prior to issuing the final solicitation. If a utility has good cause for a shorter comment period or quicker release of a solicitation based on the nature of the solicitation and the resource need being addressed, a utility may request a waiver of the rule.

COMMENT #51: One comment stated New Rule I expands the scope of long-term integrated resource planning to include distribution planning.

RESPONSE #51: The Commission disagrees. An Integrated Resource Plan (IRP) must evaluate "the full range of cost-effective means" of meeting customer service requirements. Distribution-side resources offer potentially cost-effective means of meeting customer service requirements and, therefore, cannot be ignored in the planning process. Utilities have recognized this fact in the past. A plan submitted by a utility in 2019 addressed several distribution-side resources, including a microgrid project and three distribution-level community solar projects. By influencing the shape and/or peak of the load at the distribution level, these resources affect resource needs at the transmission level. Although the Commission disagrees that the rule requires a full integration of distribution planning and resource planning, any resource acquisition strategy may be accompanied by impacts on delivery systems and those impacts should not be ignored in the resource planning process.

COMMENT #52: One comment stated that the Commission has misunderstood HB 597 by confusing the roles of the independent monitor and the third-party administrator.

RESPONSE #52: The Commission disagrees. Although Montana law differs in certain respects from similar laws in other states, the Commission's proposed rule pertaining to use of the third-party administrator required in HB 597 is reasonable. The legislature did not define the term "third-party," but the term is sometimes defined as "any party to an incident, case, etc. who is incidentally involved." In turn, "incidentally" is defined as "apart or aside from the main subject of attention." The Commission is persuaded by a preponderance of public comments, including

comments from the bill sponsor, as well as the plain meaning of "third-party" and common sense, that the legislature intended a degree of separation or independence in requiring a utility to use a third-party administrator to evaluate bids when a competitive solicitation may result in utility ownership of a selected resource. As the Commission explained in responses to Comments #1, #2, and #4, effective competition that achieves statutory planning goals and benefits customers requires a fair and objective process that instills confidence in prospective participants. Utilities seem to acknowledge this. In a recent draft IRP, one utility asserts its competitive solicitation processes will be conducted, monitored, evaluated, and scored by an "independent evaluator."

COMMENT #53: Several comments expressed concern over the proposed definition of affiliate.

RESPONSE #53: The Commission appreciates this perspective and has replaced the definition with a modified pre-existing definition of affiliate from ARM 38.5.7001.

COMMENT #54: One comment expressed concerns regarding the inclusion of costs for fuel delivery, infrastructure, permitting, land use and rights of way, abandonment, and securitization in the definition of cost.

RESPONSE #54: The Commission declines to eliminate these items from the definition. Although a utility may not know the actual costs for these items in the planning process, the goal is not to ignore the potential or likelihood of such costs, which could distort planning results and procurement strategies in ways that increase risk to the utility and its customers. The point is to be thorough and transparent in the planning analysis. Many costs analyzed in the planning process are estimates and the identified cost items are no different. In addition, because the rules address costs in both the planning and procurement context, the definition needs to be broad enough to work in both contexts.

COMMENT #55: One comment disagreed with the inclusion of probabilistic estimates under New Rule III(1)(d).

RESPONSE #55: The Commission believes it is reasonable to expect probabilistic measures of the capacity value of resources and notes that the methods suggested (outage rates, historical performance, and performance testing) would reasonably be considered probabilistic. The Commission cautions utilities against potentially discriminatory applications of capacity value metrics in planning processes. For example, an expected forced outage rate may not effectively capture extreme weather-driven outages at thermal plants that coincide with peak demands, which could be better captured through effective load carrying capability (ELCC) analyses.

COMMENT #56: One comment expressed concerns the resource adequacy assessment required under New Rule III(1)(g) has vague and unclear requirements to document alternative energy.

RESPONSE #56: The Commission appreciates this comment and has modified the language in New Rule III(1)(g) to clarify the scenario.

COMMENT #57: One comment stated the Commission should either remove the requirement in New Rule III(1)(h) for utilities to provide a description of plausibly cost-effective resources that could be acquired, or redraft the rule to require utilities to provide a description of plausibly cost-effective resources, including those the utility has reasonably determined could be acquired after an investment to the transmission system.

RESPONSE #57: The Commission declines to make this revision. It is unclear how the proposed rule differs from the commenter's proposal.

COMMENT #58: One comment disagrees with the requirement for a description of the characteristics of the resources in New Rule III(1)(h) and states the cost estimates are location specific.

RESPONSE #58: The Commission disagrees with the characterization of the requirement. The rule requires estimates of potential costs, not actual location specific costs. See also the response to Comment #55.

COMMENT #59: One comment states the descriptions and information required in New Rule III(1)(j) for computer modeling are vague and arbitrary.

RESPONSE #59: The Commission appreciates this comment and has adjusted the language to be clearer.

COMMENT #60: One comment states New Rule VI (38.5.2025) (3)(c) and (3)(d)(ii) are unreasonable because they combine "must" with "where practicable."

RESPONSE #60: The Commission disagrees and believes the "must" is clearly conditional and does not create conflict.

COMMENT #61: One comment expressed concerns the rules expand competitive solicitations beyond preapproval.

RESPONSE #61: The Commission recognizes the rules mandate competitive solicitations where practicable subject to 69-3-1207, MCA, and the Commission's rules. The Commission believes HB 597 articulates a clear policy of encouraging utilities to acquire resources using competitive solicitation processes and that effective competitive solicitation processes can promote efficient utility rates. If a utility has good cause for not using competitive solicitation, a utility may request a waiver of the rule. Prudence of procurement processes and resource decisions will be examined in applications for rate recovery.

COMMENT #62: Multiple comments expressed support for the rules and encouraged the Commission to adopt them without further delay.

RESPONSE #62: The Commission appreciates the perspective of the comments.

6. In addition to making changes to the proposed rules in the amended notice for the reasons described in the responses to the comments, the department removed proposed New Rule II(11) since the term "qualifying facility" is not used in new rules. Also, the department capitalized "Commission" throughout the new rules for consistency.

/s/ LUCAS HAMILTON
Lucas Hamilton
Rule Reviewer

/s/ JAMES BROWN
James Brown
President
Public Service Commission

Certified to the Secretary of State January 3, 2023.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 42.18.121 pertaining to updates of the Montana Reappraisal Plan and Classification and Valuation Manuals	))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On November 4, 2022, the Department of Revenue published MAR Notice No. 42-1062 pertaining to the public hearing on the proposed amendment of the above-stated rule at page 2174 of the 2022 Montana Administrative Register, Issue Number 21.

2. On November 28, 2022, the department held a public hearing to consider the proposed amendment. The only attendee at the hearing was Robert Story, Executive Director of the Montana Taxpayers Association (Montax). Mr. Story also provided written comments on behalf of Montax.

3. The department has amended ARM 42.18.121 as proposed.

4. The department has thoroughly considered the comments and testimony received. A summary of the comments received and the department's responses are as follows:

COMMENT 1: Mr. Story provided commentary in general support of the rulemaking because the manuals adopted and incorporated by reference in the rule clarify and improve public understanding of a complex process and the department's policies and procedures in the manuals generally implement the law as intended.

RESPONSE 1: The department thanks Mr. Story and Montax for their support and involvement in this rulemaking.

COMMENT 2: Mr. Story commented that there is a typographical error in the department's uniform economic condition factors (ECF) formula found on pages 15 and 21 of the current and proposed Montana Residential, Commercial, and Industrial Property Classification and Valuation Manual.

The formula is displayed as:

$$ECF = \frac{1 + (Average\ Market\ Value\ \div Average\ Cost\ Value - 1)}{1 - (Total\ Land\ Value\ \div Total\ Cost\ Value)}$$

The correct residential ECF formula should be:

$$\text{ECF} = 1 + \frac{(\text{Average Market Value} \div \text{Average Cost Value}) - 1}{1 - (\text{Total Land Value} \div \text{Total Cost Value})}$$

RESPONSE 2: The department thanks Mr. Story for his valuable input and correction. Based on these comments, the department has revised the residential ECF formula on pages 15 and 21 of the Montana Residential, Commercial, and Industrial Property Classification and Valuation Manual upon adoption.

/s/ Todd Olson
Todd Olson
Rule Reviewer

/s/ David R. Stewart for
Brendan Beatty
Director of Revenue

Certified to the Secretary of State January 3, 2023.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 42.26.601, 42.26.602, 42.26.606 and the repeal of ARM 42.26.603, 42.26.604, and 42.26.605 pertaining to revisions to railroad income apportionment factors	))))))	NOTICE OF AMENDMENT AND REPEAL

TO: All Concerned Persons

1. On November 4, 2022, the Department of Revenue (department) published MAR Notice No. 42-1064 pertaining to the public hearing on the proposed amendment and repeal of the above-stated rules at page 2182 of the 2022 Montana Administrative Register, Issue Number 21.

2. On November 28, 2022, the department held a public hearing to consider the proposed amendment and repeal. The only attendee at the hearing was Robert Story, Executive Director of the Montana Taxpayers Association (Montax). Mr. Story also provided written comments on behalf of Montax. The department also received written comments from BNSF Railway Company (BNSF).

3. The department has amended and repealed the above-stated rules as proposed.

4. The department has thoroughly considered the comments and testimony received. A summary of the comments received and the department's responses are as follows:

COMMENT 1: Mr. Story provided commentary in support of the rulemaking because the proposed changes are in conformity with the process laid out in the Multistate Tax Commission compact contained in statute that allows for alternative apportionment methods for Montana corporate income taxes. The compact anticipates that at times it will be necessary for the department to customize the process to apportion corporate income to fairly tax multi-state companies.

RESPONSE 1: The department thanks Mr. Story and Montax for their support and involvement in this rulemaking.

COMMENT 2: BNSF commented its support of the proposed changes to the railroad apportionment rules. The proposed changes put in place a methodology that fairly represents railroad business activity in the state and is easy to administer as the data comes directly from regulated reporting to the federal Surface Transportation Board and the Montana Public Service Commission.

RESPONSE 2: The department thanks BNSF for its support and involvement in this rulemaking.

/s/ Todd Olson	/s/ David R. Stewart for
Todd Olson	Brendan Beatty
Rule Reviewer	Director of Revenue

Certified to the Secretary of State January 3, 2023.

NOTICE OF FUNCTION OF ADMINISTRATIVE RULE REVIEW COMMITTEES

Interim Committees and the Environmental Quality Council

Administrative rule review is a function of interim committees and the Environmental Quality Council (EQC). These interim committees and the EQC have administrative rule review, program evaluation, and monitoring functions for the following executive branch agencies and the entities attached to agencies for administrative purposes.

Economic Affairs Interim Committee

- Department of Agriculture
- Department of Commerce
- Department of Labor and Industry
- Department of Livestock
- Office of the State Auditor (Commissioner of Securities and Insurance)
- Office of Economic Development
- Division of Banking and Financial Institutions
- Alcoholic Beverage Control Division
- Cannabis Control Division

Education Interim Committee

- State Board of Education
- Board of Public Education
- Board of Regents of Higher Education
- Office of Public Instruction
- Montana Historical Society
- Montana State Library

Children, Families, Health, and Human Services Interim Committee

- Department of Public Health and Human Services

Law and Justice Interim Committee

- Department of Corrections
- Department of Justice

Energy and Telecommunications Interim Committee

- Department of Public Service Regulation

Revenue Interim Committee

- Department of Revenue
- Montana Tax Appeal Board

State Administration and Veterans' Affairs Interim Committee

- Department of Administration
- Montana Public Employee Retirement Administration
- Board of Investments
- Department of Military Affairs
- Office of the Secretary of State
- Office of the Commissioner of Political Practices

Transportation Interim Committee

- Department of Transportation
- Motor Vehicle Division (Department of Justice)

Environmental Quality Council

- Department of Environmental Quality
- Department of Fish, Wildlife and Parks
- Department of Natural Resources and Conservation

Water Policy Interim Committee (where the primary concern is the quality or quantity of water)

- Department of Environmental Quality
- Department of Fish, Wildlife and Parks
- Department of Natural Resources and Conservation

These interim committees and the EQC have the authority to make recommendations to an agency regarding the adoption, amendment, or repeal of a rule or to request that the agency prepare a statement of the estimated economic impact of a proposal. They also may poll the members of the Legislature to determine if a proposed rule is consistent with the intent of the Legislature or, during a legislative session, introduce a bill repealing a rule, or directing an agency to adopt or amend a rule, or a Joint Resolution recommending that an agency adopt, amend, or repeal a rule.

The interim committees and the EQC welcome comments and invite members of the public to appear before them or to send written statements in order to bring to their attention any difficulties with the existing or proposed rules. The mailing address is P.O. Box 201706, Helena, MT 59620-1706.

HOW TO USE THE ADMINISTRATIVE RULES OF MONTANA AND THE MONTANA ADMINISTRATIVE REGISTER

Definitions:

Administrative Rules of Montana (ARM) is a looseleaf compilation by department of all rules of state departments and attached boards presently in effect, except rules adopted up to three months previously.

Montana Administrative Register (MAR or Register) is an online publication, issued twice-monthly, containing notices of rules proposed by agencies, notices of rules adopted by agencies, and interpretations of statutes and rules by the Attorney General (Attorney General's Opinions) and agencies (Declaratory Rulings) issued since publication of the preceding Register.

Use of the Administrative Rules of Montana (ARM):

Known Subject	1.	Consult ARM Topical Index. Update the rule by checking recent rulemaking and the table of contents in the last Montana Administrative Register issued.
Statute	2.	Go to cross reference table at end of each number and title which lists MCA section numbers and department corresponding ARM rule numbers.

RECENT RULEMAKING BY AGENCY

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies that have been designated by the Montana Administrative Procedure Act for inclusion in the ARM. The ARM is updated through September 30, 2022. This table includes notices in which those rules adopted during the period July 22, 2022, through December 23, 2022, occurred and any proposed rule action that was pending during the past 6-month period. (A notice of adoption must be published within six months of the published notice of the proposed rule.) This table does not include the contents of this issue of the Montana Administrative Register (MAR or Register).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through September 30, 2022, this table, and the table of contents of this issue of the Register.

This table indicates the department name, title number, notice numbers in ascending order, the subject matter of the notice, and the page number(s) at which the notice is published in the 2022 Montana Administrative Register.

To aid the user, this table includes rulemaking actions of such entities as boards and commissions listed separately under their appropriate title number.

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